

STATE OF MICHIGAN
COURT OF APPEALS

DARREN CASWELL,

Plaintiff-Appellee,

v

MARY CASWELL,

Defendant-Appellant.

UNPUBLISHED

December 28, 2006

No. 263173

Oakland Circuit Court

LC No. 2004-695852-DO

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. Defendant challenges the trial court's determination that the marital home was entirely a marital asset, and also challenges the trial court's denial of her request that plaintiff pay \$10,000 of her attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

The distribution of property in a divorce is governed by statute. *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003); *Reeves v Reeves*, 226 Mich App 490, 493; 575 NW2d 1 (1997). Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division, but the parties' separate assets may not be invaded unless one of two statutory exceptions apply. *Korth, supra*. Invasion of a spouse's separate estate is permissible if, after division of the marital assets, "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." *Id.* In other words, invasion is allowed when one party demonstrates additional need. *Id.* Invasion of a spouse's separate estate is also permissible when the other spouse "contributed to the acquisition, improvement, or accumulation of the property." *Id.* at 291-292. Under this exception, when a spouse significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation. *Id.* at 292. When this exception applies, the trial court may include in the property distribution such assets as appear to the court to be equitable under all the circumstances of the case. *Id.*

It is undisputed that defendant had approximately \$130,000 in equity in her home at the time of the marriage. As in *Reeves*, the \$130,000 equity that accrued before the marriage should have been considered defendant's separate property, not part of the marital estate.

Plaintiff's reliance on *Pickering v Pickering*, 268 Mich App 1, 12-13; 706 NW2d 835 (2005), is misplaced because that case is factually distinguishable. In *Pickering*, the defendant claimed that his premarital equity, as well as cash that he brought into the marriage, should be treated as separate property. The premarital equity was treated as marital property because the original home, where the parties resided for 15 years, was sold and the proceeds invested in a new marital home. Under these circumstances, the premarital equity lost any characteristic of being separate property. The cash was treated as marital property because it was commingled with marital property.

Here, unlike in *Pickering*, the parties' home was never sold and a repurchase did not occur. Because the parties maintained the property, the independent and separate nature of the premarital equity was readily identifiable and distinguishable from the remaining balance of the property in which both parties had an interest as marital property. The commingling concept recognized in *Pickering* is inapplicable to defendant's premarital home equity.

Under the circumstances, the trial court clearly erred in determining that the entire marital home was marital property, and in not making a factual determination of the value of plaintiff's separate equity interest, which should be excluded from the marital estate. See *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). While there may be some justification for invading defendant's separate interest in the property, or a portion thereof, given plaintiff's contributions to this asset after the marriage, the trial court failed to make adequate findings of fact regarding this issue. Therefore, we remand for further proceedings to enable the trial court to consider whether plaintiff is entitled to a share of the equity in the home. As this Court explained in *Reeves, supra* at 497, "After properly recognizing the parties' separate estates and the marital estate, the court may consider whether invasion of defendant's estate is necessary. Before the court may invade defendant's separate estate it must specifically find that one of the two statutory exceptions exists." The trial court may consider additional evidence on remand to determine if invasion of defendant's separate estate is necessary, articulate the basis on which such invasion is necessary, and determine the appropriate amount.

Defendant also argues that the trial court erred by denying her request for attorney fees in the amount of \$10,000. We disagree.

Attorney fees in divorce actions are not recoverable as of right, but a party may be ordered to pay the other party's reasonable attorney fees if necessary to enable the other party to defend or prosecute the action. MCL 552.13; *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). The party requesting fees must allege facts sufficient to show that the party is unable to bear the expense of the action and that the other party is able to pay. MCR 3.206(C)(2)(a); *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). The trial court's decision will not be reversed on appeal absent an abuse of discretion. *Stackhouse, supra*.

In this case, the trial court reasonably concluded that, given the property distribution, as well as its award of spousal support and plaintiff's payment of defendant's medical expenses, an award of attorney fees was not justified. The trial court did not abuse its discretion.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh

/s/ Bill Schuette